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PETITION FOR REHEARING

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1967

No. 735

Jake Klein, Julian Garrett et ux.,
Petitioners

v.

The United States,
Respondent

Julian Garrett et ux., Neill Garett et
ux., and Earl Wagner,
Petitioners

v.

The United States,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Claims

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PETITION FOR REHEARING

The petitioners ask for a rehearing of the Court's denial, on January 15, 1967, of their Petition for Writ of Certiorari to the United States Court of Claims.

QUESTIONS PRESENTED

(1) Whether the record supports the affirmative defense of the United States that payment of just compensation has already been made to the petitioners for the taking of their gravel interests; and

(2) whether the record supports the defense, also affirmative, that the gravel contracts were not taken but were merely frustrated, and whether such defense is available to the United States, the United States not having asserted such defense in the condemnation cases, and after having admitted-and never denied- in the condemnation cases, the taking of the gravel contracts and its liability to pay just compensation for such taking.

SHORT STATEMENT OF ARGUMENT

The two affirmative defenses, namely "frustration and "payment" are contradictory. They were upheld by the Court of Claims and they are presented on pages three and four of

the government's Brief in Opposition. They may be more fully described as follows:-

(1) The gravel contracts "were not taken by the United States at all but simply frustrated" and therefore "that the Fifth Amendment does not require compensation for consequential damages resulting, as here, from the frustration of contracts or business when land is condemned."

(2) The petitioners have already been paid in the District Court condemnation cases for their gravel interests and, "Contrary to petitioners' supposition, the Court of Claims did not rely on res judicata, but merely demonstrated that the just compensation requirement of the Fifth Amendment had been fully satisfied."

Thus the Court of Claims and the government in "(1)" state "that the Fifth Amendment does not require compensation" and in "(2)" state "that the just compensation requirement of the Fifth Amendment had been fully satisfied." They admit in "(2)" the "just compensation requirement of the Fifth Amendment" in the cases at bar, while denying such requirement in "(1)".

The defense of payment is based upon certain awards made by the United States District Court for the Southern District of Iowa at Des Moines in the condemnation cases of the lands which the gravel deposits underlay. Important

among the factors of value that were included in the awards was, as stated by the District Court "the reasonable profit which could be anticipated" from the performance of the gravel contracts (Government exhibit, District Court's Memorandum of October 19, 1966, Additional Appendix 11). Anticipated future business profits would certainly be personal property and not within the jurisdiction of the District Court in statutory actions for the condemnation of real estate. There was no question in the condemnation trials in Des Moines but that the government had taken the gravel contracts and was liable for the payment of just compensation therefor. The petitioners wich to call to the attention of the Court in some detail exactly what was done in the district court condemnation trials. The petitioners do not believe there was any payment of just compensation in the constitutional sense to anybody for the taking of the petitioners' gravel interests.

The petitioners will show that the defense of "frustration" cannot apply to the facts in the cases at bar and that all the authorities cited by the government on this subject support the petitioners' and not the government's position. Also, the petitioners submit that if such defense were available to the government, the government should have asserted such defense in the condemnation cases in Des Moines. Not having done so, the government has waived this defense and it should be thereafter estopped from asserting such defense, particularly after

having admitted its liability, in Des Moines, for the payment of just compensation for the gravel interests.

ARGUMENT

Conforming to the chronology of the facts the petitioners will argue "Payment" first and "Frustration" second.

PAYMENT

It would seem that the government's principal defense is that of payment. Obviously, if they have already been paid, the petitioners have no case. The government attached as exhibits to its Motions for Summary Judgment and to several of its briefs, the declarations of taking, the condemnation complaints and other documents from the records of the condemnation cases in the United States District Court in Des Moines. The government also gave the Court of Claims the District Court's Memorandum of October 19, 1966 (Additional Appendix 3-13) ex parte, which has discovered by the petitioners only when they saw references to the Memorandum in the opinion (Pet. App. 3) of April 14, 1967, of the Court of Claims sustaining the government's Motions for Summary Judgment. The Memorandum of December 13, 1966, (Add. App. 19-23) was given to the Court of Claims during a hearing on January 10, 1967. All of these documents were introduced into the record for the sole purpose of establishing the

government's claim of payment. But there is nowhere any evidence of any payment whatsoever, lawful or unlawful, to the petitioners, Garrett for the taking from them of their gravel leases."

The government's defense of payment was set up by the joinder of the instant Court of Claims cases to the land condemnation cases in the District Court in Des Moines, although at the time of the "joinder" the instant cases were already pending in the Court of Claims and that Court already had jurisdiction over them (Pet. 9). The "joinder" was accomplished by requests by the government to the condemnation commission for special findings and by instructions given by the District Court to the Commission, in both cases. The first instruction was a stock textbook instruction given by the Court in all its condemnation cases. The other two, however, were unprecedented among the Red Rock Reservoir cases. The instructions, relating to minerals or gravel, were as follows:

(Government Exhibit, District Court's Memorandum of October 19, 1966 Add. App. 7)

> "The court further instructs the commissioners that when a tract of land contains minerals, timber, buildings or any other features which constitute a part of the realty, the existence of these features can be taken into consideration, in determining the compen-

sation so far as they affect the market value of the land but the market value of the land as land remains the test and there can be no recovery for any of the foregoing elements valued separately as merchandise as items additional to the value of the land."

(Same Government Exhibit, Add. App. 4)

The government "* * * hereby requests the Commission to set forth in its Findings of Fact and Conclusions of Law whether or not there was any enhancement to Tract No. 866 by virtue of the fact that sand and gravel deposits are located under a portion of said tract. If the answer to the above is in the affirmative, the Commission should set forth the extent of the enhancement, if any."

(Same Government Exhibit, Add. App. 12, 21)

"In this case the ownership of the land is in the Garretts who entered into a gravel contract with Earl Wagner (Jake Klein). After you have determined just compensation for the fee simple estate taken by the Government, you are instructed to determine what amount, if any, of such just compensation shall be awarded Earl Wagner

(Jake Klein) by reason of such gravel contract."

The Garretts made various objections to the last instruction including the one as referred to by the District Court: "The defendants Jake Klein, Loyat Bland Garrett and Julian Garrett filed a twenty-one page pleading on November 23, 1966, entitled 'Motion to Strike and Plea to the Jurisdiction' " (Government Exhibit, Memorandum of District Court of December 13, 1966 Add. App. 19). The District Court, however, rejected all objections, stating that the pleading was not timely and that all the defendants had requested that the instruction be given (Add. App. 12, 21). The defendants, Garrett, in their appeals, deny they made any such requests and point out that there is nothing in the District Court records showing they made such requests. In any event, the petitioners submit that the District Court did not have jurisdiction over the gravel matters since these properties were not included in the government's declarations of taking and condemnation complaints and estimated just compensation was never deposited for them (Pet. 12-14). Jurisdiction over subject matter cannot be conferred by consent or stipulation of the parties. As this Court said in United States v. Corrick, 298 U.S. 435, 440:

"The appellants did not raise the question of jurisdiction at the hearing

below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined sua sponte, to proceed in the cause. (Citing cases) And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. The decree must, therefore, be reversed and the cause remanded with directions to dismiss the bill."

The joinders of the instant cases in the Court of Claims to the condemnation cases in the District Court in Des Moines were not permissible for the following reasons:

1. The instant cases were filed in the Court of Claims in February, 1966, whereas the "joinders" were not attempted until April and May, 1966-after the Court of Claims had already taken jurisdiction.

2. New or additional property, namely the gravel, gravel contracts and gravel businesses, could be taken by condemnation only by listing

them in a new declaration of taking and condemnation complaint, or, perhaps, by including them in amendments to the original declarations of taking and complaints and, in either case, by the deposits of estimated just compensation as to such new properties. This was not done and, the petitioners submit, the procedure followed-introducing the gravel contracts into the condemnation cases merely by means of instructions by the District Court, has no sanction or validity under the law and the District Court could not thereby give itself jurisdiction over the gravel matters.

3. The statutes conferring original jurisdiction on the District Court to try federal condemnation cases refer only to the condemnation of real estate.

4. The gravel contracts and gravel businesses and the anticipated profits from the gravel businesses were personal property (Pet. 13-14) and the former owners could sue for just compensation for the taking from them of such properties only under the Tucker Act. In holding an award for rent void the Fifth Circuit Court of Appeals stated in United States v. 534.7 Acres (Fla.) (1946) 157 F2d 828: "**claims under the Tucker Act may not be made in a condemnation proceeding."

The petitioners submit that there were no payments at all to them of just compensation in the constitutional sense for the taking from them

of their gravel contracts and gravel businesses. In order to reveal exactly what was done by way of "payment" and how, as the government put it "the just compensation requirement of the Fifth Amendment had been fully satisfied" (Government Brief in Opposition 4), the petitioners again refer to the Governments's Exhibit, the District Court's Memorandum of October 19, 1966 (Add. App. 5-6) where the District Court, adopting the Commission's Report stated:

"It (the Commission) found that just compensation for the entire fee simple title to tract #866 to be $121,800.00; that the value of the gravel lease was $5,000.00. The report further shows that the Commission in finding the total just compensation allocated the same as follows:

"350 acres of cropland at $275.00 per acre	$ 96,250.00
191 acres of timber, waste and building sites, including buildings	9,550.00
Additional increment allowed for the underlying sand and gravel under tract 866	16,000.00
Total	121,800.00"

Obviously the gravel lease was not included in the "total" compensation award. The $5000 to gravelman Wagner for the gravel lease was not included among the items listed, the "Total" value was for land only, as shown by the items that went into it, and under the District Court's Instruction No. 4 (Add. App. 7) no "merchandise" or non-land value could be considered by the Commission. And, the District Court also instructed (Add. App. 12, 21) the Commission that: "In this case the ownership of the land is in the Garretts." Therefore, all of the awards made for the land should have gone to the landowners, the petitioners Garrett. There was no instruction or finding that the gravelman, Wagner owned any of the land. The petitioners have already pointed out (Pet. 13-14) that in 1966 the Court of Claims, in other cases, held, referring to mineral leases, "that such leases do not constitute a sale of any part of the land." Yet the District Court (Add. App. 11) took $5000 from the award made for the land only, and gave this sum to Wagner-- and the Court of Claims held this was payment of just compensation to the petitioners, and the government says "that the just compensation requirement of the Fifth Amendment had been fully satisfied."

(Government Brief in Opposition 4)

The petitioners call particular attention to the including by the District Court among the

factors of value used in determining the value of the gravel contracts of "the reasonable profit which could be anticipated" (Add. App. 11). The government made no objection to the consideration of this factor of value nor did it appeal. It therefore not only admits again its liability to pay just compensation for its taking of the petitioners' gravel contracts--it also admits by acquiescence its liability to pay for lost anticipated business profits as reflected in the value of the contracts. In the purchase of any business this factor would usually be the most important considered by any prospective purchaser. But this factor goes to the value of a business, the gravel business, which is personal property, and it would be inadmissible in determining the value of the land. And the consideration of such anticipated profits would certainly contradict and violate the District Court's Instruction 4 (Add. App. 7) which strictly and properly limited the Commission to the consideration of land values only. Yet the District Court took $5000 from the award made strictly and legitimately for the land and used this sum to pay for the gravel lease, including such anticipated business profits! The $5000 not having been included in the total award made only for the land in the first place, there could be no justification in law, morality or logic for taking this amount from the legitimate award made only for the land, and using it to pay for expropriated personal property. And the government argues and the Court of Claims holds (Government Opposition

Brief 4) that the petitioners, including the Garretts, have already been paid for the taking of the gravel leases from them. Taking $5000 from the Garretts and calling this "compensation" to them? Nonsense! The ancient homily "Robbing Peter to pay Paul" certainly fits this situation.

It would almost seem that the District Court thought that the Garretts instead of the government "took" the gravel leases and anticipated profits. Suppose the District Court had decided the gravel lease was worth $100,000 instead of $5000. Taking $100,000 away from the "Total" of $121,800 would leave the landowners, the Garretts only $21,800 for their land. And what if the District Court thought the lease worth $200,000? The more valuable the lease the more the Garretts would lose. The absurdity of this part of the record is manifest.

The lower courts completely overlooked the crucial fact that before there could be any profits in carrying on the gravel business-- indeed, before any gravel business could be carried on at all-- royalty would first have to be paid by the gravelmen to the landowners for every cubic yard of gravel taken for their gravel businesses. Logic and justice demand that instead of "robbing" the landowners so as to pay the gravelmen for their lost "anticipated profits" the landowners should have been paid by the government for their lost royalties-- EX-

CEPT that the District Court did not have jurisdiction to award compensation for lost anticipated profits and lost royalties in statutory actions for the condemnation of real property, which actions never included the gravel contracts or gravel businesses or gravel royalties, all of which were personal properties and which were never included in the declarations of taking or in the condemnation complaints.

The situation of petitioner gravelman Jake Klein is identical in the other case except that the gravel enhancement of the value of the land was found to be $6000 and Klein was allowed $1000 from the land award for the taking of the gravel contract.

Nothing was paid or awarded to the petitioners, Garrett, the grantors in the gravel leases, for the taking from them of their part of the leases. And the taking of parts of the awards legitimately made only for the land, from the Garretts and the payment of such parts to Wagner and Klein, neither of whom owned any part of the land, was certainly a payment "to the wrong persons." As the Court of Appeals for the Fifth Circuit said in Clark v. White, 185 F2d 528 at page 530:

> "The Constitution requires that just compensation is made and the statutes charge the district court with seeing that this is done. It cannot be done by paying it to the wrong people."

In the constitutional sense, then, there was no just compensation paid to anybody for the taking of the gravel leases and gravel businesses. The only legitimate awards made were for the land. There was merely a robbing of Peter (the grantors, Garrett) to pay Paul (the grantees, Wagner and Klein). But the government made the payments without objection and without taking any appeals, and while the payments made were not just compensation in the constitutional sense, they were nontheless admissions of liability.

FRUSTRATION

A perplexing feature of the case is the startling metamorphosis that takes place en route between Des Moines and Washington in the government's attitude toward the gravel matters. In Des Moines, in the District Court, the government admits the taking of the gravel leases. Indeed, the District Court, in Des Moines, began its Memorandum of October 19, 1966 (Add. App. 3) as follows:

> "This matter is now before the Court upon objections to the report of the Commission determining just compensation for the taking of the title in fee of tract 866 consisting of 541 acres of land and for the taking of a gravel lease on said premises."

The District Court obviously held there was indeed a "taking" of the gravel lease, and it re-

ferred to the fee and the gravel lease separately. And, in the report of the condemnation commission, adopted by the District Court, was a reference to the "taking" of the lease (Add. App. 11):

> "e. Based upon the market, the quantity and quality of the sand and gravel and the reasonable profit which could be anticipated the Commission finds that the just compensation to Earl Wagner for the taking of the lease of January 8, 1962, is $5,000.00."

The government acquiesced in these statements. It admitted its liability for taking of the gravel leases when it acquiesced in and participated in the requests for special findings and the giving of instructions to the Commission relating to the gravel matters, as set out earlier in this Brief. And, as already pointed out, in the second paragraph of its argument (United States Brief in Opposition on 4) it states "that the just compensation requirement of the Fifth Amendment had been fully satisfied." We have here a specific admission that the Fifth Amendment requires just compensation for the taking of the gravel contracts in Des Moines, that is. But something mysterious happens en route to Washington. In Washington, before the Court of Claims and now before this, the Supreme Court, the contracts, as stated in the first paragraph of the argument (United States Brief in Opposition 3) "were not taken by the United

States at all but simply frustrated" and the Court of Claims so held. Obviously the contracts were not frustrated in Des Moines and therefore they could not be frustrated in Washington. Nothing new or different happened to them in Washington. There may, indeed, be frustrations in Washington, but they can have no application to the cases at bar.

The government was in complete control of the condemnation cases in Des Moines and it initiated or consented to all the procedures that were followed. The petitioners submit that the government should be estopped, after the position it took throughout the trials in Des Moines, consenting to and acquisecing in the nominal, although made without jurisdiction, awards to the gravel contract lessees, and paying the amount of such awards into Court- from now reversing its position and claiming that it never took the gravel contracts at all. The law (Pet. 4-7) gives the government and the government alone the power to determine what properties it will take by condemnation, and the government alone also determines what properties it will take without condemnation. But in either case it is still subject to the requirements of the Fifth Amendment.

The rights of the petitioners do not correspond in any way to the rights of the Omnia Company in Omnia Commercial Co. v. U.S., 261 U.S. 502 (1923) a wartime case, which is the

case relied on principally by the government. The Omnia Company was merely a steel customer of the Allegheny Steel Corporation and it had no contact with the government, nor did it have any claim to any specific steel. The Omnia Company would be in the position of a gravel customer who had contracted for a quantity of gravel from the plaintiff gravelmen. The Allegheny Steel Corporation was not allowed to furnish the steel to the Omnia Company. But the Allegheny Company certainly received just compensation. As aforesaid the government had nothing to do with the Omnia Company but it took harsh, direct and intended action against the petitioners, specifically to force them to give up the performance of the gravel contracts and the carrying on of their gravel businesses (Pet. 16-17, 19). And, after depriving the petitioners of their gravel businesses by threats and by legal action, the government then furnished gravel to gravel customers of the petitioners (Pet. 16, 19-20). If, after forcibly preventing Allegheny from perfroming its contract to fill Omnia's order for steel, the government had then taken Allegheny steel and supplied it to Omnia and had refused just compensation NOT TO OMNIA BUT TO ALLEGHENY--then the cases would be somewhat similar. The petitioners should be cast in the role of Allegheny- not of Omnia.

The Court of Claims overlooks the fact that the gravel businesses of the petitioners was taken as well as the gravel and gravel contracts

(Pet. 16, 19-20) and that thousands of tons of gravel were furnished by the Government to gravel customers of the petitioners. The government (Government Op. Br. 4) and the Court of Claims (Pet. App. 5-6) cite Mitchell v. U.S., 267 U.S. 341 (1925) where a claim was not allowed for the loss of a corn-canning business when the government took the land on which the corn was produced. The government had not taken the corn or the corn-canning business.

But the government DID take the petitioners gravel and gravel business.

The Court of Claims, in its opinion of April 14, 1967 (Pet. App. 5-6) states that it followed the Mitchell case in its own recent case of R. J. Widen Co. v. U.S., 174 Ct. Cl. 1020, 357 F. 2d 988 (1966). The Widen Company was in the leather business and the construction of the government's flood control project damaged the Company's leather inventory and caused business losses. No compensation was allowed because the government had not taken the leather or the leather business, the Court of Claims stating (Pet. App. 6):

> "* * * Undoubtedly, the United States could here have taken the plaintiff's personal property and business, in which case just compensation would be due. But this was not done."

The petitioners submit that THIS WAS DONE in the instant cases, and therefore, they are entitled to just compensation.

The Court of Claims, in its opinion (Pet. App. 3-4) cites A. W. Duckett & Co. v. United States, 266 U.S. 149 (1924) and thereby adds the instant cases to the illegitimate progeny of that much cited case. The illegitimate progeny result from the overlooking, by lawyers and courts, of the first word "Ordinarily" of the sentence for which the case is usually cited. The Duckett case and the cases at bar are not ordinary cases. Also overlooked is that Duckett is not a condemnation case. And, surprisingly, what the case holds is overlooked. This Court reversed the Court of Claims holding that Duckett's property (a lease) had not been taken. A separate award was ordered for Duckett even though there had already been a settlement with the owner, the Bush Terminal Co.

The condemnation cases in Des Moines were not ordinary cases either. Mr. Frank McAnear of the Department of Justice in Washington was in attendance in Des Moines and participated actively in the trials of both cases. This was a distinction accorded to none of the other Red Rock Reservoir cases as far as we know.

WITHDRAWAL OF ADMISSION

The petitioners withdraw their "agreement" (Pet. App. 2, 3) "that the fee simple titles taken by the defendant included the gravel deposits". The government's conduct from the time in 1962 of the filing of its declarations of taking and its condemnation complaints up to the time, December 30, 1966, when it paid into court the final awards made in the condemnation cases show conclusively that the gravel deposits were not included in the takings. There is no question but that the government did NOT deposit any estimated just compensation for any of the gravel items, including the gravel deposits. The government's representatives stated, in 1962, that the government was not depositing or paying anything for gravel because it hadn't taken any gravel-that there was no gravel there, although full information about the gravel had been given. Later, when events forced even the government to admit that massive deposits of commercial gravel were present, the government did not amend its declarations of taking and condemnation complaints or deposit any money as estimated just compensation for the gravel. And it continued to refuse to pay anything for any of the gravel items. And at the time the final condemnation judgments were paid into court, December 30, 1966, the gravel items were paid for out of the new funds just paid into court (Add. App. 18, 28) although there was still money remaining from the original deposits of estimated just compensation

made in 1962-- thus confirming the fact that the government did not deposit any estimated just compensation for the gravel items back in 1962. The petitioners are entitled to amend their petitions so as to plead these facts in full, and also to plead the government's various admissions as heretofore discussed.

The petitioners Julian Garrett and Loyat Bland Garrett had lived on the now condemned land since the spring of 1942 and it had been their home and sole means of livlihood for them and their five children. All this time they had had a comfortable feeling of security in the knowledge that their land contained gravel deposits amounting to millions of cubic yards. They knew that anytime they could bring themselves to enter into gravel contracts and permit the tearing up into gravel pits of their beautiful Iowa rich farmland, the royalties provided for by the contracts would amount to a fortune every few years, particularly since the rising business cycle seemed likely to continue indefinitely. The Red Rock Dam Project forced their hand. But even in 1962 it seemed likely that it would be 10 years or so before the land would be flooded, and there was still time to get out the gravel- so the gravel contracts were entered into. But the way matters have been manipulated they not only lose the sizeable royalty fortune the gravel contracts should have given them-- the gravel contracts even became

liabilities for which they were charged $5000 and $1000 as explained in detail earlier in this argument. They are very bitter.

CONCLUSION

Finally, the petitioners submit that the government has not proved its defenses of payment and frustration as matters of law so as to entitle it to summary judgments. On the contrary, the two defenses are conclusively disproved by the government's own exhibits.

For all of the foregoing arguments and reasons the petitioners ask that they be given a rehearing of the Court's denial of their Petition for a Writ of Certiorari.

Respectfully submitted.

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CERTIFICATE OF GOOD FAITH

The undersigned certifies that he is a member of the bar of this Court and that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay and that it is restricted to the grounds specified by the rules of the Court.

Bert A. Bandstra

CERTIFICATE OF SERVICE

The undersigned certifies that he is a member of the bar of this Court and that he served the above and foregoing Petition for Rehearing by mailing a true copy thereof by prepaid air mail to each of the following persons:

Erwin N. Griswold, Solicitor General
J. Edward Williams, Acting Asst. Attorney General
Edmund B. Clark,
John G. Gill, Jr., Attorneys
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Bert A. Bandstra